IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 664 of 1986

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH
HONOURABLE MR.JUSTICE K.A.PUJ

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT - Appellant(s)
Versus
KOLI NARSHI RAJA & 4 - Opponent(s)

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Appearance :
MR KT DAVE, APP for Appellant(s) : 1,
MR SUNIL C PATEL for Opponent(s) : 1 - 5.

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 15/06/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE C.K.BUCH)

1. Feeling aggrieved by the order of acquittal passed by the learned Additional Sessions Judge, Junagadh in Sessions Case No.59 of 1985 dated 28.2.1986 the State of Gujarat has preferred the present Appeal under Section 378 of the Criminal Procedure Code.

2. Initially the State had sought leave to appeal against the order of acquittal of five accused narrated by the learned Trial Court. However, after hearing the learned APP the Court (Coram: A.P.Ravani, and N.B.Patel, JJ.) refused to grant leave to appeal for the acquittal recorded qua respondents Nos.2 to 5 (Original Accused Nos.2 to 5) and accepted

the request and granted leave to appeal against the respondent No.1 – original accused No.1 – Narshi Raja. We have considered the rival contentions placed before us and a detail arguments advanced by Mr.K.T.Dave, learned APP appearing for the appellant – State. It would be beneficial to mention the facts in brief for the sake of convenience.

3. The case of the prosecution before the learned trial Judge was that the accused formed unlawful assembly with an intention to commit murder of deceased – Samat Hamir and in furtherance of that common intention the respondent accused – Narshi Raja gave three knife blows to the deceased on the abdomen on 10-5-1985 at about 9:30 p.m. The deceased – Samat Hamir was pausing himself to be a doctor and was having his dispensary at village – Kukasvada. Undisputedly the deceased and the accused are first cousin and

some of the eye witnesses examined by the prosecution were near the place of incident and as both the families i.e family of the deceased and accused were preparing for the marriage ceremony of Piyush Raja – brother of the respondent accused, practically all the members of the family were there at village – Kukaswada. It is alleged that the respondent accused – Narshi Raja came near the dispensary of deceased Samat Hamir and gave a call to him and, thereafter, there was some exchange of words between them and the accused gave three knife blows to him. At that very time accused persons have also actively participated, mainly the wife of the accused No.1 in getting hold of the deceased – Samat Hamir. The Narshi Raja gave three blows of knife and the deceased sustained serious injuries with that sharp cutting instrument. The injured then was immediately taken to Chorvad PHC and from there he was taken to Civil Hospital Junagadh. The

injured Samat Hamir was admitted in Civil Hospital at Junagadh at about 12:30 i.e. 0.30 hours on 11.5.1986. The Police Head Constable of Junagadh City Police Station on receipt of DO rushed to the hospital and took the complaint i.e. FIR from the injured – Samat Hamir and immediately thereafter the Executive Magistrate also recorded dying declaration of deceased – Samat. Condition of deceased – Samat Hamir was deteriorating and he was taken to Ahmedabad V.S.Hospital so that he can avail a better treatment if need be, but ultimately the injured – Samat Hamir died at V.S.Hospital on 11.5.1986 at 11:15 p.m instant. The motive is neither specifically pleaded nor proved. However, after investigation police charge-sheeted total five persons, but after trial the learned Additional Sessions Judge acquitted all of them by reasoned order and this very order of acquittal is before us for evaluation and fresh finding on the grounds

mentioned by the State in the memo of Appeal.

4. We have gone through the various grounds taken by the State and the facts pointed out by learned APP Mr.Dave. The prosecution has examined number of witnesses. However, the arguments have been concentrated by the learned APP for the State and Mr.Sunil C. Patel, learned counsel representing the respondent No.1 accused on the evidence of following witnesses :-

(a) Hamir Sarman Ex.19

(b) Naval Kachara Ex.20

(c) Lakhman Tida Ex.21

(d) Hira Hamir Ex.22

(e) Piyush Raja Ex.33

(f) Meghiben Sarman Ex.23

(g) Daya Hamir Ex.38
(Brother of the deceased)

(h) Kishoriben Ex.39
(wife of deceased Samat Hamir)

5. FIR is at Ex.46 and dying declaration

recorded by the Executive Magistrate, Junagadh is at Ex.36 in the papers which are available to us for perusal and appreciation. We have carefully gone through the evidence of the witnesses as well as evidence led by panch witnesses who have been examined to prove the allegedly recovery of the muddamal knife at the instance. As per the say of the prosecution the muddamal knife has been recovered vide Ex.54 panchanama drawn under Section 27 of the Evidence Act. While placing the case of the prosecution before us Mr.Dave has taken us through the map of the scene of the incident prepared by Revenue Circle Inspector – Ex.16 alongwith the description given by the Revenue Officer. Reading of the map we are satisfied with a rough sketch drawn by the Revenue Officer is based on a scene of offence panchnama prepared by the Investigating Officer and there is no much controversy on the facts reflected in scene of offence panchnama and

the map available on record. Considering the existing super structure that was there at the open Falia where the incident occurred, according to us, the finding of learned trial Judge that PW – Hamir Sarman Ex.19 could not have seen the incident, that is, actual act of assault because of 90 degree angle of super structure is not correct. He has accepted that he was sitting nearby Ashok Tree, popularly known as Asopalav. Plain reading of answer given by this witness has also created an impression in our mind that he has not deposed in a transparent way and on material point has attempted to play a game of hide and seek, as for example, he has shown his ignorance of the involvement of deceased Samat in the political activity and also as to membership of his another son – Dinesh in the District Panchayat. It appears that on the date of deposition he was of sound mind and he had no reason to suppress the things that were not even very much

material either to prove or disprove the correct fact. At page-180 of the paper book (para-10 of the decision) it is rightly observed that it would be risky to accept the version of Hamir PW -3 as the version of a person who has actually seen the incident and, therefore, he has not been believed. His status of favour of a person of deceased also could not have been ignored and in that background his evidence was required to be scanned closely and the same has been evaluated accordingly. In the same way, the learned trial Judge has appreciated the evidence of other witnesses in para-11 to 14 of the judgment under challenge (pages – 183 to 186 of the paper book). Four witnesses examined by the prosecution who according to us are material witnesses have not suppressed the case of the prosecution i.e. Lakhman Tida, Hira Hamir, Piyush Raja and Meghiben Sarman. These witnesses were not able to satisfy the Court that the present appellant

– respondent accused as alleged had given knife blows to the present deceased as pleaded by the prosecution.

6. The pointed question raised before us by Mr.Dave is that whether it was possible for the learned trial Judge to link the present respondent with the crime on the strength of evidence available on record by way of dying declaration of deceased Samat. It is argued that so far as the act of blows given by the respondent accused is concerned, two different dying declarations recorded within a hour or two are consistent. When it is possible to ignore the improvement or other infirmity, then as per settled legal position, the Court can accept the convincing part of both the dying declarations made by deceased – Samat whereby deceased has said that he is a victim of the knife blows given by the respondent accused. The learned trial Judge while appreciating the evidence led by

the prosecution by placing two dying declarations on record has observed that it would not be safe for the Court to convict any of the accused on the strength of the dying declarations. The relevant discussion is there in para-16 of the decision (page-187 of the paper book). As we have mentioned earlier deceased – Samat was brought to the Civil Hospital, Junagadh at about 12:30 i.e. 0:30 a.m on 11-5-1986 and on receipt of intimation from the Medical Officer, Civil Hospital, Junagadh the Police Head Constable on hospital duty recorded the complaint Ex.46. The recorder of the complaint (the first dying declaration) has been examined and it emerges that he has recorded the complaint of injured – Samat in time between):45 hours and 1:30 hours. According to the Executive Magistrate examined by the prosecution he had reached to hospital at 1:30 a.m so at one point of time the Police Officer who has recorded the complaint and

the Executive Magistrate probably met each other at the Civil Hospital, Junagadh. It is stated by the Executive Magistrate in his deposition that he started recording dying declaration at about 1:45 a.m on 11.5.1986 and completed the exercise within about 30 minutes. So in couple of minutes the learned trial Judge has found that the injured has attempted to make material improvement and he has given inconsistent version to both these officials i.e one Police Personnel and second Executive Magistrate. The tenancy of a person who intends to implead more number of persons normally introduce these persons in his subsequent statement recorded during the course of investigation. In the present case the situation is contrary to this, normal tendency goes in the complaint recorded. In earlier point of time the accused was shown active participation of five persons. However, he conveniently omitted the role played by other four accused persons than the

present respondent – accused Narshi Raja. A pointed question was asked by the Executive Magistrate to injured in presence of the other persons at the spot of the incident, but he has refrained from involving other close relatives of the family of the present accused. When he was asked by the Executive Magistrate as to the motive of the incident, but the answer given according to us is not up to the satisfaction and the answer on the contrary creates a shadow of doubt on the entire case of the prosecution. It is settled that in all cases of direct evidence the prosecution is not supposed to plead the motive and obviously therefore there is no necessary to prove such motive, but when a motive is pleaded by the prosecution in case of indirect evidence then such motive substantially has to be proved or to the satisfaction of the Court, it has to be proved. Sometimes the motive may be hidden in mind of the accused and the victim may not

be knowing that how and why he or she has been assaulted. But in totality of the evidence available in the present case it does not give impression that the motive must be hidden in the mind of the present respondent. It is clear from the evidence that father of the accused Raja and father of the deceased Samat are real brothers and Meghiben is real sister of Hamir and Raja. As observed earlier this Meghiben has not supported the case of the prosecution. In this background it was possible for the deceased to say that how and why his first cousin attempted to kill him by giving fatal blows before the marriage ceremony of his younger brother Piyush. So the attempt by deceased to keep curtain on the motive of the crime takes the testator under the shadow of cloud and the learned trial Judge observed that conviction based on dying declaration of such person would not be a safe and convincing conclusion. The case of the

prosecution is supposed to establish the case beyond all doubts. So considering both the dying declarations in the present case available on record, in absence of strong corroboration, it was not safe for the trial Judge to place reliance on any of these two dying declarations. We are aware that “falsus in uno falsus in omnibus” is not a settled and accepted principle of criminal jurisprudence in our country. But close scrutiny of oral evidence of PWs Hamir Sarman, Naval Kachara or Daya Hamir are not able to provide sufficient corroboration to the version given by the deceased in the dying declaration recorded by the learned Executive Magistrate and/or by the Police Officer of Junagadh City Police Station, which is found on record in the nature of complaint.

7. One more point which requires to be considered by us is this that in the dying

declaration given by the deceased before the Executive Magistrate the deceased has stated that his brothers have gone to Chorwad for lodging of the complaint of the incident, but no attempt was made by the prosecution to show during the trial that no formal complaint, at any point of time then Ex.46 has been given by the brother of the deceased at Chorwad Police Station. Considering the distance between Kukasvada and Chorwad vis-a-vis village Kukasvada and Civil Hospital Junagadh it is amply possible that a person who has left for Chorwad Police Station for lodging complaint which was within the knowledge of the present injured must have reached much prior to the arrival of the deceased Samat at Civil Hospital Junagadh. So the prosecution whether has suppressed that story might have been unfolded before Chorwad Police Station or actually nobody had gone to Chorwad for lodging complaint, are the questions that have remained unanswered

in the present case.

8. As per settled legal position while dealing with the appeal against the order of acquittal the Court should go very slow and unless the finding recorded by the learned trial Judge is either perverse or patently illegal, the order of acquittal normally should not be reversed. Of course we are not in agreement of submissions made by Mr.Patel that the lapse of years also should be viewed as an important circumstance while reversing the finding of acquittal recorded by the learned trial Judge. But we accept the argument advanced by Mr.Patel based on the decision in the case of **Ajit Savant Majagavi vs. State of Karnataka, (AIR 1997 Supreme Court6 3255)** wherein the Apex Court has observed that:-

(a) In an appeal against an order of acquittal, the High Court possesses all the powers, and nothing less than the powers, it

possesses while hearing an appeal against an order of conviction.

(b) The High Court has the power to reconsider the whole issue, reappraise the evidence and come to its own conclusion and findings in place of the findings recorded by trial Court, if the said findings are against the weight of the evidence on record, or in other words, perverse.

(c) Before reversing the finding of acquittal, the High Court has to consider each ground on which the order of acquittal was based and to record its own reasons for not accepting those grounds and not subscribing to the view expressed by the trial Court that the accused is entitled to acquittal.

(d) In reversing the finding of acquittal, the High Court has to keep in view the fact that the presumption of innocence is still available in favour of the accused and the same stands fortified and strengthened by the

order of acquittal passed in his favour by the trial Court.

(e) If the High Court, on a fresh scrutiny and reappraisal of the evidence and other material on record, is of the opinion that there is another view which can be reasonably taken, then the view which favours the accused should be adopted.

(f) The High Court has also to keep in mind that the trial Court had the advantage of looking at the demeanour of witnesses and observing their conduct in the Court especially in the witness-box.

(g) The High Court has also to keep in mind that even at that stage, the accused was entitled to benefit of doubt. The doubt should be such as a reasonable person would honestly and conscientiously entertain as to the guilt of the accused.

9. It is rightly argued that in an appeal against the acquittal, the High Court should

attach greater weight to appreciation of the evidence by the Trial Judge who had the occasion to watch demeanour of the witnesses. We would like to reproduce relevant part of para-25 of the decision of this Court **in the case of State of Gujarat vs. Bharatbhai Balubhai Lad and Ors., reported in 2006(1) GLH 718**, wherein this Court (Coram: A.M.Kapadia and S.R.Brahmbhatt, JJ.) referring the decision of Ramesh Babulal Doshi vs. State of Gujarat (1996) 9 SCC 225 has observed that "it is a cardinal principle of criminal jurisprudence that in an acquittal appeal if other view is possible then also Appellate Court cannot substitute its own view by reversing the acquittal into conviction, unless the findings of the Trial Court are perverse, contrary to the material on record, palpably wrong, manifestly erroneous or demonstrably unsustainable." We also accept the submission of Mr.Patel based on the decision of **Ram Swaroop & Ors., vs.**

State of Rajasthan, reported in 2004(4) Supreme To-Day 254, whereby the Hon'ble Supreme Court has held that if the view taken by trial Court while acquitting accused was a possible, reasonable view of evidence, High Court ought not to interfere with such acquittal merely because it was possible to take contrary view.

10. In view of above discussion according to us the acquittal recorded by the learned trial Judge in the present case accused – Narshi Raja is not required to be interfered and is not required to be reversed and we confirm the acquittal. The appeal filed by the State is hereby dismissed.

(C.K. BUCH, J.) (K. A. PUJ, J.)

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